[UN-REPORTED]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.606 OF 1999.

Kailaschandra Ghanashamji Upadhay]
Age : 48 years, Occ : Farmer]
R/at. Village Bhaisoda,]
Tal : Bhanpura, Dist.Mansoor]
Madhya Pradesh] Appellant.
(At present lodged in Yerwada] (Org.Accused)
Central Prison, Pune.)]

versus.

The State of Maharashtra] Respondent.

Mr.S.V.Sakhare, Adv.appointed, with Mr.Ganesh Gole for the appellant .
Mr.D.R.More, APP, for the State.

CORAM : D.G.DESHPANDE,J.

DATED : 11th August 2004.

ORAL JUDGMENT

1. Heard Mr.Sakhare, Advocate, who is

appointed for the appellant/accused to defend since the appeal is filed through jail and Mr.More, the learned APP for the State.

2. By this appeal, the accused has challenged his conviction under the provisions of NDPS Act and he is sentenced under Section 21 r/w 8(c) by which he is sentenced to suffer R.I. for ten years and to pay a fine of Rs.One lakh in default R.I. for four months. The accused is in custody from the date of his arrest i.e. 17.11.1998.

3. Advocate for the accused made four submissions while challenging the order of conviction. Firstly, according to him, there is no compliance to Section 50 of the NDPS Act. Secondly, even though writing (Exhibit 5) is taken from the accused about the said compliance, at that time the accused was in custody of the police and, therefore, the police might have exerted their pressure upon the accused to obtain the said writing. Thirdly, according to him, panch is habitual panch and is a Court bird as he has acted as a panch in 3/4 cases of the same police station. He contended that the CA report

does not give percentage of Heroine that was detected and, lastly, according to him, the FIR is silent as to who actually took the search of the accused. Further according to him, the prosecution had not examined Sr.Police Inspector and, for all these reasons the judgment of conviction was liable to be set aside and the accused is entitled for acquittal.

4. The case of the prosecution is that P.W.1 at the relevant time i.e. on 17.11.1998 was attached to Nagpada Police Station. PSI Mukhedkar received an information from one of his informants that one person by name Kailash, aged about 45 to 50 years, 6’ tall, well built, having partly grey hair, wearing grey strips shirt and blue colour pant was likely to come near Arabia Hotel, Moreland Road, Nagpada to deliver gard powder. PSI Mukhedkar reduced the said information into writing; sent copies thereof to the superiors i.e. Sr.PI Nagpada Police Station who permitted him to arrange a raid. Two panchas were called; drug identification kit was also called from Narcotic Cell; then after taking all the precaution raiding party went near Arabia Hotel at about 20.45 hours; and they took their

respective position. At that time they saw the accused coming near Arabia Hotel. He was holding plastic carry bag and was nervously looking around. On the signal from PI Temkar, the raiding party including the panchas surrounded the accused. PI Temkar told the accused about the information received and about the search to be taken. The accused was also made aware of his right under Section 50 of the NDPS Act orally as well as in writing (Exhibit 5). The accused declined to exercise any such right and agreed to search by the police officers. Therefore, search was taken. Plastic bag was opened. Little portion of the powder tested on the drug identification kit and the result was positive for heroine. The accused found to be in possession of 300 grams . It is in this background the accused came to be charge sheeted and came to be convicted.

5. The first contention of the advocate for the accused is that there is no compliance to Section 50 of the NDPS Act. This argument cannot be accepted because PW.1 has specifically stated as to the compliance to Section 50. This was

done by PW.1 not only orally but also by getting document executed from the accused which is at Exhibit 5. That document clearly shows that the accused was made aware of his right but the accused declined to be searched before the Magistrate or gazetted officer and gave his consent for the police to search.

6. Further contention of the advocate for the accused is that at the time when Exhibit 5 was obtained from the accused, the accused was in the custody of the police, and, therefore, the police may have exerted pressure upon him or influenced him to sign the document. The evidence, about the sequence given by PW.1 and corroborated by the panch, clearly shows that at the time of obtaining Exhibit 5 the accused was not arrested by the police nor was in the custody of the police. The accused was standing opposite Arabia Hotel; he was surrounded; PI Temkar disclosed his identity and also told him about the purpose of the raid and the search; then accused was made aware of his right under Section 50; and thereafter writing was obtained. There is no challenge to the sequence nor anything was brought on record to show that before obtaining

Exhibit 5 the accused was in the custody of police. He was neither arrested nor there was any question of obtaining his custody because by the time of Exhibit 5 was obtained search has not began. The raiding party and PW.1 were not knowing the accused had in fact having any gard powder containing heroine. Therefore, this objection cannot be upheld.

7. Third ground to attack was that panch is the habitual panch, and, according to the advocate for the accused, he has acted on number of occasions for the police and he is amenable to police. P.W.3 Sayedali Sayed Kalbihariali Sayed is the panch witness. In his cross examination he has admitted in para 6 that he has acted as a panch in 2 or 3 cases of Nagpada Police Station. and in one case PSI Mukhedkar was there. The question is whether on the basis of such an admission, the entire testimony of this witness should be discarded and I do not find any reason to do so. His evidence is of corroborative nature and he fully supported the prosecution case. It is true that this admission shows that he has acted for 2/3 for Nagpada Police Station as a panch. But nothing on record to show that

all those cases were under the NDPS Act. For branding the witness as a habitual witness of the police, something more should have been brought on record in the cross examination. He is a person, as found in the cross examination, who takes contract of repairing building and he had 8 to 10 workers. He is a income tax prayer and, therefore it cannot be said that such a person would be under the thumb of the police and would be ready to please them at any time as per the choice of the police. He appears to be responsible person. There are no criminal antecedents against him and nothing is brought on record to show that he is in day-to-day contact of the police. Therefore, I do not find that only because the witness has acted on 2 to 3 occasions, his testimony should be disbelieved.

8. Third contention of the advocate for the accused was that in the CA report no percentage of heroine is shown. CA report is at Exhibit 14 and the result of the analysis is described as under "Heroin (Diacetyle Morphine) is detected in the exhibit along with other--opium alkaloids. The exhibit falls under Section 2(xvi) e of the NDPS Act, 1985. It is true that percentage of

heroine in the sample is not stated by the CA. However, the quantity that was recovered from the accused is 300 grams. The offence is of November 1998. Section 21 of the NDPS has no application to such offence and the accused cannot claim benefit of having been found in small quantity or commercial quantity. The Supreme Court has made this distinction in the judgment reported in **2003(4) Crimes 390 (SC) [P.P.Fathima v. State of Kerala]** wherein the Supreme Court has held that the amended Section 21 has no application to the offences that were committed in 1998 i.e. prior to the introduction of Section 21. Apart from this, PW.1 has stated that with the drug identification kit they tested the brown powder and it was found to be gard.

9. Lastly, it was contended by the advocate for the accused that the FIR is silent as to who actually took the search of the person of the accused. It appears that there was no occasion for the police to take personal search of the accused in the sense to search whether there is anything in the shirt or trouser of accused or concealed anything in his body. The information was that the accused was going to bring gard

powder for delivery. When the raiding party saw the accused near Arabia Hotel, he was carrying plastic bag in his hand and, therefore, only that bag was taken into possession by the police.

10. Even if it is accepted for the sake of arguments that the witnesses should have stated as to who took the search actually. The evidence of PW.1, in para 5, clearly shows that in the presence of panchas P.S.I. Kadam took the search of the accused. It may be in the FIR this fact is not there, but that will not affect the case of the prosecution because on other point the FIR is fully corroborated by the testimony of PW.1.

11. The last point urged by the advocate for the accused is that the prosecution did not examine the Sr.P.I. The role of Sr.P.I. in this matter appears to be that he gave permission to carry out raid. He was not present at the time of raid. Therefore, considering his role, non-examination of Sr.PI does not affect the case of the prosecution in any manner whatsoever.

12. At this juncture, Mr.Gole and Mr.Sakhare, appearing for the accused, contended that if the

CA report does not contain percentage, then the accused is entitled for reduction of sentence. This argument cannot be accepted in view of the aforesaid judgment of the Supreme Court because Section 21 of the NDPS Act came to be introduced in 2001. This offence is of 1998. Therefore, as I have already held above the difference and distinction between the small quantity and the commercial quantity and consequential effect on the sentence cannot be used for the benefit of the accused.

13. For the aforesaid reasons, I do not find any merit in this appeal. The appeal is dismissed.

[D.G.DESHPANDE]

11/08/2004 JUDGE.

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